

ISSUES

The respondent contends that the Administrative Law Judge exceeded her jurisdiction in finding the respondent had violated K.S.A. 44-5,120(d)(16) and (18) and in ordering respondent to pay claimant's attorney \$200.00 for fees. Respondent further alleges that the Administrative Law Judge violated the due process rights of the respondent and insurance carrier in summarily finding a fraudulent or abusive act or practice absent notice and hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented, the Appeals Board finds that the Administrative Law Judge exceeded her jurisdiction in finding a violation of K.S.A. 44-5,120(d) and in awarding attorney's fees.

The hearing before the Administrative Law Judge on February 22, 1994, was conducted pursuant to an Application for Penalties and Sanctions filed by claimant. That application and the subsequent hearing were pursuant to K.S.A. 44-512a. That statute allows for the imposition of a civil penalty under certain enumerated circumstances. A prerequisite for the assessment of penalties pursuant to K.S.A. 44-512a is an award of compensation which has not been paid when due. In this case, there is no finding and the record does not disclose that an award of compensation had been made. What is found instead by the Administrative Law Judge is that "[t]he Respondent violated Section 1(d)(16) & (18)." A finding of a fraudulent or abusive act or practice pursuant to K.S.A. 44-5,120(d) is not necessarily a finding of a failure to pay compensation when due pursuant to K.S.A. 44-512a.

K.S.A. 44-5,120(d)(16) and (18) provide that for purposes of the Workers Compensation Act fraudulent or abusive acts or practices include:

"(16) failing to initiate or reinstate compensation when due if a clear and legitimate dispute does not exist as to the liability of the insurance company, self-insured employer or group-funded self-insurance plan;
(18) refusing to pay compensation as and when the compensation is due."

Included in the amendments to the Workers Compensation Act by the Legislature in 1993, was a directive that "The director of workers compensation . . . establish a system for monitoring, reporting and investigating suspected fraud or abuse by any persons who are not licensed or regulated by the commissioner of insurance in connection with securing the liability of an employer under the workers compensation act or in connection with claims or benefits thereunder." K.S.A. 44-5,120(a). This statute further provides that "The commissioner of insurance is hereby authorized and directed to establish a system for monitoring, reporting and investigating suspected fraud or abuse by any persons who are licensed or regulated by the commissioner of insurance in connection with securing the liability of an employer under the workers compensation act or in connection with claims thereunder." The procedure for proceedings to determine whether a person has engaged in a fraudulent or abusive act or practice is likewise included in K.S.A. 44-5,120 at subsection (e) which provides, inter alia, that such person receive a statement of the charges and that a hearing thereon be conducted in accordance with the provisions of the Kansas Administrative Procedure Act. K.S.A. 44-5,120(e). In the case at hand, there was

no finding of reason to believe that any person had engaged in any fraudulent or abusive act or practice by the Director of Workers Compensation nor by the Commissioner of Insurance. Neither was there any statement of charges and hearing thereon in accordance with the provisions of the Kansas Administrative Procedure Act. Instead, the hearing whereby the Administrative Law Judge found that the respondent had violated subsections (16) and (18) of K.S.A. 44-5,120(d) was conducted pursuant to a K.S.A. 44-512a Application for Penalties and Sanctions. In so doing, the Administrative Law Judge exceeded her jurisdiction.

This matter is before the Workers Compensation Appeals Board pursuant to K.S.A. 44-551. It is not brought pursuant to an appeal following a hearing and determination pursuant to the Kansas Administrative Procedure Act. In deciding the issue presented in this appeal, the Appeals Board does not intend to suggest, nor do we find, that we have jurisdiction to hear matters involving allegations of fraudulent or abusive acts or practices for purposes of the Workers Compensation Act. This decision is limited to the facts in this case under the particular and peculiar procedure by which the determination of a violation of K.S.A. 44-5,120(d) was made.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered February 22, 1994, by Administrative Law Judge Shannon S. Krysl, is hereby reversed, set aside and held for naught in so far as it finds respondent violated K.S.A. 44-5,120(d) and orders respondent to pay claimant's attorney's fees.

IT IS SO ORDERED.

Dated this ____ day of July, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David H. Farris, PO Box 47370, Wichita, KS 67201-7370
Curtis Perry, 200 W. Douglas, Suite 630, Wichita, KS 67202
Shannon S. Krysl, Administrative Law Judge

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DOCKET NO. 184,306

George Gomez, Director